No. 40

In the Supreme Court of the United States

October Term, 1961

DAVID D. BECK,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

PETITIONER'S REPLY BRIEF

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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INTRODUCTION

The brief of respondent fails to come to grips with the important constitutional problems of this case. In effect, it asks this Court to affirm on the basis that ordinary procedural forms were observed by the trial court—that is, an oath was administered to the grand jurors, the petit jurors were admonished to decide the case on the evidence, and so on. Such an approach, if followed, would vitiate every constitutional inquiry in a case of this type. If the observance of judicial formalities were decisive, few if any due process cases could be decided otherwise than against the individual. The inquiry must go to the substance of what happened; by that standard, the conclusion

is inescapable that this petitioner has been indicted, convicted and sentenced without due process or equal protection of law.

The sequence of points adopted by respondent will be used in replying to its contentions. The section headings which follow are intended to indicate the three basic questions of the case.

WAS PETITIONER DEPRIVED OF HIS RIGHT UNDER THE FOURTEENTH AMENDMENT TO TRIAL BY AN IMPARTIAL JURY?

First, respondent claims (Br. 22) that "there was no attempt by the newspapers to inflame the public against petitioner." The apparent purport of this is that since no malice has been shown on the part of those who operate the public media, nothing which they did can now be claimed by petitioner to have led to deprivation of his constitutional rights. Even if this were true, it would miss the point. The State's reasoning recalls the comment of the ancient poet Bion that, though boys throw stones at frogs in sport, the frogs do not die in sport but in earnest.[1]

It is of course not the intentions of the press or even of the Senate committee that count, but rather the effect of their activities upon the grand and petit juries which indicted and tried petitioner.

Similarly, respondent persistently refers to the publicity adverse to petitioner as "factual reports of news events" (e.g., at Br. 28). (It is worth noting that throughout its brief respondent mentions only the publicity from and after the date of the indictment; the massive attacks upon pe-

[1] Cited in Edmund Cahn, *The Sense of Injustice* (New York University Press, 1949), p. 113.

titioner which took place from March to July are nowhere touched upon, and their inevitable effects are ignored.) Respondent's position has this much merit: if attacks upon an individual as a thief and racketeer by innumerable highly-placed persons constitute news, then indeed most of the publicity between the indictment and the trial constituted reporting of news events. Typical of such coverage were the *Saturday Evening Post* article of August 24, 1957 entitled "Can Labor Live Down Dave Beck?" (Tr. 605) and newspaper headlines such as that of October 1, 1957, "Beck Called Symbol of Corruption" (Tr. 641). Obviously, whether such publications are characterized as reportage or editorials, their prejudicial effect is as great. Indeed, in the recent case of *Irvin v. Dowd*, 366 U. S. 717, 6 Law Ed. (2d) 751 (1961), most of the publicity could have been described as reporting of "news events" in the sense that the defendant's confession, his offer to plead guilty, his denunciation by other citizens, and so on, constituted news.

In any event, there was in fact a great deal of editorializing throughout 1957 pertaining to petitioner. Much of it was couched in terms of "labor corruption"—but here as elsewhere, such publicity must be read and understood in the light of the Senate committee's sustained attack upon petitioner individually and in light of the sensational reaction which took place throughout the country, and especially in petitioner's home town. It has been impossible to incorporate all such publications in the exhibits in this case. This fact should also be borne in mind with regard to respondent's contention (Br. 2) that only 191 pages of adverse written matter has been supplied. Petitioner has made clear

throughout the literal impossibility of assembling more than an illustrative fraction of what was published against him. The statistics set forth by respondent are only an attempt to evade the reality of the situation.

Moreover, respondent totally overlooks television and radio publicity. This, particularly the television material, had an incalculable effect. It is impossible to reproduce such matter here. However, the many affidavits submitted in petitioner's behalf concerning it have at all times remained uncontroverted.

The state argues further that much of the adverse publicity did not relate to this case. Yet clearly, publicity concerning other alleged crimes of an accused arouses even greater community hostility. See *Delaney v. United States*, 199 F. (2d) 107 (1 Cir. 1952).

Respondent also asserts (Br. 25) that the judges below "found" that community hostility did not exist. An examination of the record will show that this is not true. No such finding was ever made. Petitioner's motions for continuance and change of venue were denied on the grounds that petitioner's arguments "did poor credit" to the prospective jurors of the county, and that there was no guarantee that a fairer trial could be obtained six months later (R. 726).

At Br. 30, respondent asserts that the "*voir dire* examination of the trial jury conclusively showed that they were fair and impartial." The answer to this is that jurors' assertions of impartiality must be disregarded where the surrounding circumstances make them inherently doubtful. See *Irvin v. Dowd, supra; Marshall v. United States*, 360 U.S.

310 (1960); *Juelich v. United States*, 214 F.(2d) 950 (5 Cir. 1954); *People v. Nathan*, 249 N.Y. Supp. 395 (1931).

Reliance is placed upon various admonitions of the trial judge to the jury (Br. 30-32). It should be noted that the portions quoted by respondent contain no fewer than three separate reminders to the jury that their having read and heard publicity was not in itself disqualifying, thus inviting them to announce themselves as qualified. Further, the trial court advised them, regarding the publicity, that:

> "No intelligent person would rest a decision on such an impression without a more formal and more convincing type of proof." (R. 52-53).

The quoted remark, of course, supplied still another invitation to the jurors to assert impartiality. In this context, it is not realistic to accept such assertions.

At Br. 33 respondent contends that petitioner interposed no challenge for cause against the twelve jurors finally selected. This is incorrect. A challenge to the entire panel, and motions for continuance and change of venue, were entertained and renewed at all times on the express ground that the jurors could not act impartially.

Citing *United States v. Handy*, 351 U.S. 454 (1956), respondent states (Br. 25) that petitioner's burden is to show essential unfairness "as a demonstrable reality." But the State seems to interpret this rule to mean that the defendant must come forward with some kind of direct evidence of impartiality, perhaps such as affidavits from jurors that they had consciously lied upon *voir dire* examination. Such is not the meaning of the rule, and such

a burden would be impossible for any defendant to bear. As shown by *Irvin v. Dowd, supra,* the petitioner can only be expected to show a sustained buildup of prejudice in the community to an extent where due process must have been denied. Here, that occurrence has been shown clearly and convincingly. The State, and four of the eight judges below, have asserted that "only nineteen" of the fifty-five veniremen subjected to some degree of *voir dire* examination were excused for prejudice (see Br. 33). Yet all of the twelve who tried the case had heard of it in advance, and eleven admitted having been exposed to the adverse pretrial publicity. Of the latter, many had undergone far more exposure than many of the nineteen who were excused. It is not the admitted prejudice of some jurors which is now the concern, but the unconscious or unacknowledged prejudice of the others. As this Court said in *Irvin v. Dowd*:

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

Under the circumstances of this case, true impartiality could not have existed at the time and place of the trial.

DID PETITIONER HAVE THE RIGHT TO A FAIR AND IMPARTIAL GRAND JURY, AND TO BASIC FAIRNESS IN GRAND JURY PROCEDURE, UNDER THE FOURTEENTH AMENDMENT?

Although this issue formed the heart of the dispute among the equally divided judges below, it is barely touched upon by respondent in its brief. The four judges who voted for affirmance below

have unequivocally held that the Fourteenth Amendment does not include any right to fair and impartial grand jurors or to elemental fairness in grand jury procedure. It is submitted that this view, if adopted, would lead to the most flagrant deprivations of constitutional rights through the improper use of grand jury proceedings.

Respondent at Br. 34-40 makes no direct argument on the subject. Instead, it is argued that the Fourteenth Amendment protects a criminal accused in a state proceeding only at the trial stage. The short answer to this is the first sentence of the opinion in *Cassell v. Texas,* 339 U.S. 282:

> "Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial grand jury."

Indeed, if the State were correct this Court could never have decided a grand jury case on federal constitutional grounds. Yet, many cases of fundamental importance have been so decided, and it is clear that the standards of fairness implicit in the Fourteenth Amendment have been and must be applied to state grand jury proceedings. See *Cassell v. Texas, supra*; *Hernandez v. Texas,* 347 U.S. 475; *State v. Pierre,* 306 U.S. 354; *Re Oliver,* 333 U.S. 257; *Eubanks v. Louisiana,* 356 U.S. 584.

Further, it is submitted that basic unfairness at the grand jury stage virtually *ipso facto* deprives the accused of a fair trial. The trial of the present case was infected throughout with prejudicial matter stemming from the unlawful use of the grand jury. For example, a prospectively important witness, Fred Verschueren, Jr., was threatened, intimidated and rendered for all practical purposes unavailable; the fact that petitioner's secretary had

invoked the Fifth Amendment before the grand jury was indirectly but effectively used by the prosecutor at the trial; a former mayor of Seattle was permitted to testify from recollection to what petitioner had allegedly told the grand jury; and the prosecutor in final argument referred with vigor to the fact that the grand jury had chosen to return a true bill. See petitioner's brief 29-33, 69-75.

The State has suggested no reason why grand jury proceedings should be exempt from constitutional requirements of fairness. It is hard to imagine one. Fairness and impartiality of the tribunal, and basic fairness in procedure, are the foundation stones of criminal due process under the Fourteenth Amendment. Nothing in our history suggests that the grand jury is intended to be a lawless sword in the hand of the prosecutor. On the contrary, the requirement of Amendment V of the United States Constitution of indictment by grand jury in federal prosecutions suggests that the institution is intended as well to be a shield protecting the rights of the public.

It is no answer to claim, as the State does, that the proceeding could have been initiated by information (Br. 38) or that petitioner has "conceded" that the errors herein could have been cured by dismissing the indictment and later filing an information (Br. 33). Petitioner has intended no such concession (see *supra* regarding the manner in which the unlawful grand jury procedure infected the trial); rather, petitioner's position is that the deprivation of constitutional rights here involved could have been avoided had an information been used in the first instance. The law is that

where a state *does* elect to proceed by grand jury, it must do so in a constitutional manner. See *Eubanks v. Louisiana,* 356 U.S. 584; *Ballard v. United States,* 329 U. S. 187.

HAS PETITIONER SHOWN THAT HE WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL GRAND JURY, AND TO BASIC FAIRNESS IN GRAND JURY PROCEDURE?

Although conceding that the grand jury was called "as a direct result of the McClellan committee hearings which commenced on February 26, 1957, and the publicity flowing therefrom" (Br. 3), respondent avoids entirely the responsibility of summarizing or describing that publicity. The record makes abundantly clear that there could be no disagreement with the statement of four of the eight judges below that:

> "The amount, intensity and derogatory nature of the publicity received by appellant during this period is without precedent in the State of Washington." (R. 867)

Beyond a flat one-sentence assertion that bias has not been shown (Br. 40) respondent makes no argument on the point. Instead, the State contends (Br. 5, 42) that a state statute requires the grand jury to take an oath which includes the words "you shall present no person through envy, hatred, or malice," and that this oath must have been given to this jury. First, there is nothing whatever in the record to suggest that this form of oath was given, and the State has never before suggested, in over four years of litigation, that it was. Second, the giving of such an oath is obviously irrelevant. Presumably, oaths of this general type

were taken by the jurors in the *Irvin* case, the *Cassell* case, and in the several other jury-fairness cases which have been decided by this Court. (The oath in question, incidentally, does not preclude the jurors from indicting on the basis of prejudgment of guilt.) In any event, if the taking of an oath were thought to be decisive of the issue, no case of this general nature would be reviewed by this Court.

It is contended that "news coverage can do no more than establish a 'mere opportunity' for bias" (Br. 41). This statement flies in the face of several prior holdings of this Court cited above. The fact is that publicity can, and in this case did, establish a public atmosphere of bias going far beyond the "mere opportunity" stage. It is hard to imagine a clearer example of intense and universal community hostility than that which has been shown here.

At Br. 41-42, respondent describes the presiding judge's address to the grand jury as "a brief objective explanation to the grand jury of the nature of the inquiry they should conduct." This "explanation" consisted of the following:

> "We come now to the purpose of this grand jury and the reasons which the judges of this Court thought sufficient to justify the expense to the county, and the inconvenience to and sacrifice by you, which this grand jury session will require.
>
> "It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which

had come to the union from the dues of its members. It has been alleged that many of these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal Law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.

"The president of the Teamsters Union has publicly declared the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain." (R. 329-33)

These references to the testimony before the Senate Committee, to an alleged public declaration that the money was a loan (which declaration petitioner never made as to the funds here involved), and to the "necessary criminal charges", cannot be called "objective"; they were, in fact, an incitement to indict.

At Br. 4-5, the State points out that three prospective grand jurors (not five as claimed) were asked if they were conscious of any bias arising out of their labor union connections. The two others cited by the State were asked only if jury service might "embarrass them". Certainly respondent cannot honestly argue that this inquiry, limited as it was to three panelists who were labor union members, in any way negates the bias and prejudice of the grand jury. No inquiry whatever was made of any of the other jurors. Worse yet, the jury was not even instructed to try to act impartially. The judge's last words to them were those quoted above.

which virtually amounted to a request that petitioner be indicted. And lest any juror have doubt as to who was president of the Teamsters Union, the judge referred to him by name:

> "You are not acquainted with . . . Mr. Beck?" (R. 324)[4]

In no case of this type is direct evidence of prejudice available to the defendant. Petitioner had no chance to conduct any *voir dire* examination of the grand jurors. The latter are prohibited by statute (RCW 10.28.100) from stating or testifying to the opinions expressed by any of them during their sessions. In this case as in others which this Court has decided, the showing has been made on the basis of obvious and intense community hostility, coupled here with the shockingly unjudicial manner of convening, instructing and conducting the grand jury.

At Br. 16, the State sets forth a lengthy summary of the testimony of Fred Verschueren, Jr. before the grand jury. The apparent purpose of this is to convince the Court (as the prosecutor convinced the grand jury) that the witness was not telling the truth. Improving upon the statement of one judge below that the handling of Verschueren was "a little harsh", the State concedes that it was "very harsh" (Br. 44). In fact, the handling of this witness by the prosecutor was of an extreme viciousness which flouted the most rudimentary concepts of fairness and decency. The transcript of this interrogation is appended to one of the opinions of the court below (R. 887-895), and is also reproduced in the appendix to the petition for

[4] Compare *Fuller v. State*, 37 So. 749 (Miss. 1905), where a closely similar inquiry —"Have you ever heard of Charlie Fuller?"—was held to require quashing of the indictment.

certiorari. The witness was threatened with prosecution for perjury and with imprisonment, and the jurors were virtually instructed not to believe him. The effects of this total disregard for fairness reached through the trial: the witness was brutalized and intimidated to the point where he could not be called. And as the State correctly implies in its brief, had the grand jurors believed Verschueren—a choice which they had the right to make themselves without intimidation by the prosecutors—the indictment in all probability would not have been returned.

The respondent has made no substantial argument in support of its bare assertion that bias and prejudice have not been shown.

CONCLUSION

The State's argument rests entirely upon meaningless formalities and does not reach the serious issues here involved. This case is concerned with what the late Mr. Justice Jackson rightly called "one of the worst menaces to American justice."[3] The power of modern mass media of communication to discredit and destroy an individual is immense. Where there is added to it the power of a Senate investigating committee—with its inquisitorial methods, its ready alteration between interrogation and denunciation, its willingness to conduct televised hearings—the combined effect is well nigh incalculable.

There can be no doubt that a principal purpose of the Senate hearings was to destroy and discredit

[3] Concurring in *Shepard v. Florida*, 341 U. S. 50 (1951).

petitioner.[4] There was in truth no real effort to elicit information from him. As the committee chairman pointed out, the questioning was allowed to continue for day after day in the face of a full invocation of the Fifth Amendment for the sole purpose of exposing petitioner's alleged misconduct and claim of privilege to the American people (see *Hearings*, op. cit. supra note 4). And as the committee counsel has written, referring to the time of petitioner's second compulsory appearance before the committee on May 16, 1957, which in turn was four days before the grand jury convened:

> "Now he was dead, although still standing. All that was needed was someone to push him over and make him lie down as dead men should."[5]

Perhaps such committee activity is praiseworthy. But even if it is, it cannot justify the State of Washington in convicting petitioner and sentencing him to prison without due process or equal protection of law. It may be well enough for Senator McClellan to announce that petitioner had "committed many criminal offenses" (R. 656). It is another matter entirely for the presiding judge below to make what amounted to the same announcement to the grand jurors—i.e., to direct their attention to the testimony before the committee that hundreds of thousands of dollars had been embezzled or stolen from the Teamsters Union, to say that petitioner's claim that he had borrowed the money presented a question of fact for them, to say that the "necessary

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[4] This is made clear by many statements of committee members reproduced in the written transcript of the hearings, which has been published in full under the title *Hearings Before the Select Committee on Improper Activities in the Labor or Management Field*, Eighty-Fifth Congress, First Session (U. S. Gov't. Printing Office).

[5] Robert F. Kennedy, *The Enemy Within* (Harper & Brothers, 1960), p. 35.

criminal charges" could only be brought in King County, to make no inquiry as to their prejudice, and to fail even to instruct them to act impartially. It may be well enough for a committee counsel to express doubts as to a witness' credibility or attack him for invoking the Fifth Amendment. It is a different matter where, as here, the prosecutors in a judicial proceeding attack a witness before the grand jury by threatening him with prosecution and imprisonment for perjury, announcing that no one in the room believes him, and deliberately inflaming the grand jurors against him and the defendant. It may be desirable for the public to be persuaded by the government and by the news media that a person is guilty of many crimes. It is another matter for that person to be forced to trial before a jury which has been recently saturated with such publicity to an extent that they cannot be but biased.

This petitioner was deprived of his constitutional rights to a fair grand jury and a fair petit jury. As four of the eight judges below stated:

> ". . . it would be unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant at the time the grand jury was convened. If ever there was a case which required the most stringent observance of every safeguard known to the law to protect a citizen against bias and prejudice, this was it." (R. 867)

There was no substantial change between indictment and trial. The denunciation and adverse publicity continued. Yet the state court observed no "safeguards" whatever to preserve petitioner's

constitutional rights in the face of unmistakable hostility and prejudice. On the contrary, at every point—from the presiding judge's address to the grand jury to the trial judge's refusal, 141 days later, to recognize the obvious fact that community prejudice was still rampant—the court served only to hasten and worsen the denial of petitioner's rights under the Fourteenth Amendment.

No argument is made here as to the propriety or fairness of petitioner's destruction as a public figure at the hands of the legislative committee. But it is submitted that this conviction, which is a fruit of the same tree and which was procured by unconstitutional means from beginning to end, must be reversed.

Respectfully submitted,

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